

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained in the parties' briefs, the Appeals Board concludes the Administrative Law Judge's preliminary hearing Order should be affirmed.

Claimant suffered a previous injury to his right knee on June 30, 1997, as a result of an automobile accident. Orthopedic surgeon Kenneth E. Teter, M.D., treated claimant for that right knee injury. On March 16, 1998, claimant underwent an anterior cruciate ligament (ACL) reconstruction and arthroscopic partial medial meniscectomy of the right knee. After completing a post-surgical physical therapy program, claimant was released to return to activities as tolerated on July 31, 1998. The only restriction placed on claimant was to wear a functional ACL knee brace.

Claimant returned to his regular construction work and had no further problems with the right knee until April 6, 1999. At that time, while employed by another employer, claimant slipped while walking up some stairs and felt his right knee pop. On April 6, 1999, Dr. Teter examined claimant's right knee and found some laxity difference between the injured right knee and his uninjured left knee of 5-10 millimeters. Dr. Teter saw claimant again on May 14, 1999. At that time, claimant was much improved. The laxity difference between claimant's knees was found to be less than 5 millimeters. Dr. Teter's final impression was "status post ACL reconstruction doing satisfactory". No return appointment was made.

Claimant commenced working for the respondent in July 1999 as a finish carpenter. Sometime prior to March 16, 2000, the date of claimant's alleged accident, he was transferred to perform concrete work on the job site at the Kansas Turnpike Authority located near Bonner Springs, Kansas.

On March 16, 2000, claimant was shoveling mud out of a footing ditch some 14 feet below grade. Claimant testified he and another employee were standing in approximately 1 foot of mud and claimant's supervisor, Martin Kerr, was immediately above claimant observing the two employees working in the ditch. Claimant testified his right leg got stuck in the suction mud and when he tried to remove his leg from the mud he felt his right knee pop and he believed his right knee had separated.

Claimant testified he told both the employee he was working with and his supervisor, Mr. Kerr, that he injured his right knee when he tried to remove his right leg from the mud. Claimant testified his supervisor was less than 2 feet from him and his supervisor had to have heard him say he had injured his right knee.

Although claimant had some pain in his right knee after this incident, the pain was not so severe that he could not continue to work. But the first time claimant had a break after the accident, claimant testified he also told his supervisor he was going to have to see

Dr. Teter because of the pain and discomfort he was having in his right knee from getting out of the mud. Claimant then made an appointment on his own to see Dr. Teter on April 7, 2000.

Respondent terminated claimant on March 30, 2000. Jeff Griffith, respondent's project manager, also testified at the preliminary hearing before the Administrative Law Judge. Mr. Griffith testified claimant was not terminated because of his injury but because of claimant's poor productivity. Mr. Griffith was of the opinion that claimant disliked the concrete work and did not have the desire to put forth a reasonable effort to perform the work. Additionally, Mr. Griffith testified that claimant never notified him that he had injured his right knee at work and also never requested medical treatment for the injury.

Claimant met with Mr. Griffith on March 30, 2000 and also on another occasion after he saw Dr. Teter on April 7, 2000. Claimant testified he was upset about the termination and never thought to notify Mr. Griffith that he had injured his right knee at work.

On April 7, 2000, claimant provided Dr. Teter with a history of injuring his right knee when his right foot got caught in some mud. Since that injury, claimant reported to Dr. Teter that he had increased pain and problems with his right knee going out. The doctor found claimant's right knee slightly effused and the ligamentous testing showed greater than 15 millimeters of laxity on the right compared to the left. Dr. Teter's impression was rerupture of reconstructed ACL of the right knee. Claimant was placed in a new brace and surgical revision of the ACL reconstruction was discussed.

Claimant returned to see Dr. Teter on May 5, 2000. At that time, claimant was still having a lot of episodes of the right knee giving away. Treatment options were discussed and claimant expressed his desire to proceed with surgical revision of the ACL reconstruction. Surgery was scheduled for May 24, 2000, but did not proceed because respondent denied claimant's claim.

Claimant's supervisor, Martin Kerr, also testified in person before the Administrative Law Judge at the preliminary hearing. In summary, Mr. Kerr's testimony was in direct conflict to claimant's testimony. Although Mr. Kerr admitted he supervised claimant and another employee while they were cleaning mud out of a footing ditch on March 16, 2000, Mr. Kerr did not recall that claimant injured his right knee or that claimant had told him of the injury. Also, Mr. Kerr could not recall that claimant told him he was going to have to go see Dr. Teter because of the right knee injury. Additionally, Mr. Kerr denied claimant was limping at any time he had supervised claimant.

Respondent principally argues that claimant did not injure his right knee while working for the respondent but did suffer an aggravation or reinjury to a preexisting right knee condition while working for another employer on April 6, 1999. Respondent contends that any medical treatment claimant now is in need of for his right knee is related to the April 6, 1999 incident and not any incident that occurred while he was working for

respondent. Respondent asserts the only evidence contained in the preliminary hearing record that claimant injured his right knee while working for the respondent is claimant's own questionable and self-serving testimony. Additionally, respondent argues claimant is an unhappy, disgruntled ex-employee who is attempting, by filing this workers compensation claim, to punish respondent for his termination.

The Appeals Board concludes claimant has proven he injured his right knee while working for respondent on March 16, 2000. This conclusion is supported by claimant's testimony and Dr. Teter's medical records that were admitted into evidence at the preliminary hearing. After the April 6, 1999 incident and while working for another employer, claimant's right knee improved and on May 14, 1999 claimant was released to return to work without restrictions. On examination, the ligamentous testing showed less than a 5 millimeter laxity of the right knee compared to the left. Then after the March 16, 2000 accident, claimant returned to see Dr. Teter on April 7, 2000. During that examination the ligamentous testing showed greater than 15 millimeters of laxity of the right compared to the left. Additionally, claimant provided Dr. Teter on April 7, 2000, with an accurate description of the March 16, 2000 accident. Claimant sought no medical treatment for his right knee between May 14, 1999, the date claimant was released after the April 6, 1999 incident, and the March 16, 2000 accident. Now, Dr. Teter has determined claimant is in need of additional surgery and claimant's right knee condition will not improve without the surgery. Dr. Teter has also imposed restrictions on claimant's work activities that were not imposed before the March 16, 2000 accident.

As noted above, concerning both the accidental injury issue and the timely notice issue, the testimony of the claimant and his supervisor, Martin Kerr, is in direct conflict. In particular, concerning the timely notice issue, the Administrative Law Judge must have believed claimant's testimony and not Mr. Kerr's testimony. The Administrative Law Judge had the opportunity to evaluate both claimant's and Mr. Kerr's credibility because both testified in person at the preliminary hearing. In circumstances such as this, where conflicting evidence provides more than one possible answer, the Appeals Board finds it is appropriate to give some deference to the Administrative Law Judge's conclusions. Therefore, at this point in the proceedings, and giving some deference to the Administrative Law Judge's conclusions, the Appeals Board finds claimant proved he provided respondent with timely notice of the March 16, 2000 accident.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing of the claim.¹

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Brad E. Avery's October 26, 2000 preliminary hearing Order should be, and the same is hereby, affirmed.

¹ See K.S.A. 2000 Supp. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this ____ day of January 2001.

BOARD MEMBER

c: John J. Bryan, Topeka, KS
P. Kelly Donley, Wichita, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director